No. 20,719

United States Court of Appeals

For the Ninth Circuit

GEORGE R. WILLIAMS, et al.,
Appellants,

vs.

PACIFIC MARITIME ASSOCIATION, a non-profit corporation, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an unincorporated association, et al.,
Appellees.

APPELLEES' PETITION FOR A REHEARING

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
NORMAN LEONARD,
1182 Market Street,
San Francisco, California 94102,
Attorneys for Appellees International Longshoremen's and Warehousemen's Union, et al.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

No. 20,719

United States Court of Appeals

For the Ninth Circuit

GEORGE R. WILLIAMS, et al.,
Appellants,

vs.

PACIFIC MARITIME ASSOCIATION, a non-profit corporation, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an unincorporated association, et al.,
Appellees.

APPELLEES' PETITION FOR A REHEARING

To the Honorable Walter L. Pope, Frederick G. Hamley and Charles M. Merrill, Judges of the United States Court of Appeals for the Ninth Circuit:

Appellees International Longshoremen's and Warehousemen's Union, et al., respectfully petition the Court to reconsider and amend its decision of August 28, 1967.

I. We believe that the Court erroneously has concluded that the trial Court can set aside the discharges of the appellants if the trial Court determines that it would be inequitable for them to be discharged and that some type of "discrimination" by the union was involved in the decision to discharge them. Appellants have urged, to the contrary, that the Court has no authority under § 301, or any other basis of federal jurisdiction, to set aside the discharges unless it be found that the decisions to discharge violated specific contract terms, as distinguished from an erroneous deciding of factual questions in applying contract terms, and that this contract violation was the result of hostile and invidious discrimination. We submit that the record before the Courts show that there is, at most, a finding of fact by the joint labor relations committee that is under attack.

Appellants were employed as longshoremen under rules adopted by the joint labor relations committee to implement the basic contract provisions authorizing more stringent rules as to Class "B" longshoremen. These implementing rules specifically provided that a limited registration longshoreman could be discharged "for any cause" except a cause prohibited by § 13 of the contract. These 1958 rules are not challenged. Appellants have negatived any claim that there was a discharge pursuant to § 13, and the Court's opinion clearly indicates that any claims of § 13 issues are not to be considered in this proceeding. Therefore, the decisions to deregister cannot be set aside as being contract violations if the discharges effected by the Joint Labor Relations Committee were "for any cause".

The affidavits presented, while they do not go to the factual issues as to whether or not the Joint Labor Relations Committee was correct in the decisions it made as to the facts of cause, do establish that the decision upheld discharges for cause. Appellants ask the Court to decide

there was error in the findings of fact as to cause made by the Joint Labor Relations Committee. *Vaca* holds that the Courts will not reverse simply because they, or the jury, would decide the fact issues differently than the grievance committees decided them.

We further assert that the Court erroneously concluded that any "discrimination" is sufficient to justify judicial intervention. By the actions of appellants in disclaiming any discrimination of the type that is prohibited by § 13, the range of potential discrimination is circumscribed to a minuscule area. Appellants in no way specify or define the nature of the claim of discrimination that they make, other than to the claim that the appellants are not permitted to be heard in advance of the rule-making action in determining what would be the standards applied to selecting them for retention or deletion from the longshore registration list and to claim routine unfair labor practices under the National Labor Relations Act. We submit that the Court was, under the opinions of the Supreme Court, obliged to sustain the summary judgment in the absence of more precise specification of the discrimination relied upon to show it to be "invidious or hostile" and in the absence of a detailed consideration and decision by this Court that the specified type of discrimination is "invidious and hostile" discrimination within the Supreme Court rulings in *Vaca v. Sipes* and *Humphrey v. Moore*.

There is no merit in the suggestion that there was "invidious or hostile" discrimination simply because the union did not hold hearings at which the Class "B" longshoremen could appear before it reached a decision with the employer members of the Labor Relations Committee to follow the standards that were used. Unions under the National Labor Relations Act have an exclusive agency power of a unique nature, one in which the union can make decisions of this type without going through any procedures of notice of hearing to persons it represents before reaching a decision. The collective bargaining process could not function if these formalities

were established as requirements for decision-making in determining rules and standards of contract administration or negotiation.

The Court also appears to hold that discrimination that is in violation of the usual provisions of the National Labor Relations Act that have been enforced for many years, in distinction to the new limitations on union activity arising out of the Court-made "statutory duty of fair representation", can be a basis for its decision. The nature of discrimination that can justify a *Vaca v. Sipes* type decision is of an entirely different type, a type not within the ordinary expertise of the Labor Board.

The opinion of the Court should be clarified in regard to what is the type of discrimination it feels has been raised here and that could be a basis below for a decision to set aside the deregistrations. The question of what type of discrimination opens the door to Court litigation of labor relations issues is an important and significant issue in the development of the law of labor relations. The nature of discrimination that can be a basis for such action in the eyes of this Court should be set forth in the opinion so that there is a clear basis for presenting issues to the United States Supreme Court on petition for certiorari should the Court feel that it has correctly determined the law on this subject.

II. We ask that the Court's opinion be amended to state more clearly that it is not making findings as to fact, or reaching conclusions as to the meaning of the contract, that are binding during further hearings in this case. True, the opinion as a whole indicates that the Court is setting aside a summary judgment and is doing so on the basis of what the appellants *might* be able to establish. The opinion indicates the Court is not acting on the basis of what will be the proper findings of fact and what will be the entirety of the contract provisions and terms that will be before the lower Court. However, at least one paragraph could be read differently.

The paragraph on pages 6 and 7 of the printed opinion dealing with "the so-called new rules" might be claimed

to imply that the Court is making a conclusive decision that these rules do not authorize the deregistration of any longshoreman and that these rules are invalid under the basic contract. This paragraph, of course, is based on a record in which appellants' affidavits must be taken as true, and they were assumed to be true in appellees' arguments before this Court. The record was one in which there was no evidence, much less findings on conflicting evidence, as to what was the actual form of the standards (which appellants label the "1963 rules") or the circumstances of their adoption. In fact, at page 11 of the printed opinion, this Court states that there is "an unsatisfactory record of alleged changes in rules". The paragraph on pages 6 and 7 and the succeeding paragraph assert that these standards (the "1963 rules") did not relate to deregistration; however, an affidavit (R. 756) states, "It was also agreed that persons then on the limited (Class "B") registration list were not found to be qualified and eligible for advancement to the full (Class "A") registration list [under these standards] would be deregistered and discharged from employment." *Specifically we ask that the paragraph on pages 6 and 7 be amended to state that this court is not deciding, in reversing the summary judgment, that the present record would permit the trial Court to decide that the rules were not validly adopted.*

III. The Court's opinion should similarly be modified in the statement (p. 2) that Class B longshoremen "were not eligible to membership in Local No. 10". There is no such suggestion in the collective bargaining contract. No issue of fact was raised on this point. Simply, the question was not considered by appellees to be relevant to the motions for summary judgment. Similarly, the opinion states that the 1963 rules were adopted "about June 17, 1963" (p. 1); this is the precise date the Court finds that appellants were deregistered. Later the Court appears to be making the inconsistent, but equally conclusive, statement that the rules were "adopted a few weeks prior . . ." to June 17, 1963 (p. 2). The opinion

also appears to make a conclusive statement that appellants had no notice of the adoption of the 1963 rules (p. 2). This Court's opinion, dealing with an order for summary judgment, should be limited to saying that appellants' allegations of fact entitled them to a trial. The trial Court will have to determine these facts if they become material issues; this Court should not appear to resolve them now.

IV. The undersigned appellees refer the Court to pages 58-61 of their brief dated January 30, 1967. The authority cited therein makes it clear that *individual officers of a labor organization* are not liable for damages in an action founded on § 301. We request the Court to amend its opinion to dispose of this issue at this time by dismissing the individual defendants from this action, thereby avoiding needless expense to the parties and needless waste of time by the district judge.

V. The undersigned appellees similarly request the Court to amend its opinion so as to resolve against appellants their claim that the district court has jurisdiction in a § 301 suit to grant injunctive relief. Such relief is clearly barred by the Norris-LaGuardia Act (29 U.S.C. § 101). *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238; *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195.

For the reasons above stated and for the reasons expressed in the petition of appellee Pacific Maritime Association, we request the Court to grant a rehearing.

Dated, San Francisco, California,
September 27, 1967.

Respectfully submitted,
GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
NORMAN LEONARD,
Attorneys for Appellees International Longshoremen's and Warehousemen's Union, et al.

Certificate of Counsel

Norman Leonard, attorney for appellees International Longshoremen's and Warehousemen's Union, et al., certifies that he has read and knows the contents of the foregoing petition and that said petition in his judgment is well founded and not interposed for the purpose of delay.

Norman Leonard,
Attorney for Appellees International Longshoremen's and Warehousemen's Union, et al.